

CHAPTER Odb 400 RULES FOR REIMBURSEMENT UNDER RSA 146-D

Statutory Authority: RSA 146-D:5

Readopt with amendment Odb 401, eff. 9-1-11 (doc. #9935-A), to read as follows:

PART Odb 401 PURPOSE AND SCOPE

Odb 401.01 Purpose. The purpose of this chapter is to establish procedures for reimbursement under RSA 146-D.

Odb 401.02 Applicability. This chapter shall apply to reimbursement for costs incurred on or after the effective date of this chapter.

Readopt with amendment Odb 402, eff. 9-1-11 (doc. #9935-A), to read as follows:

PART Odb 402 DEFINITIONS

Odb 402.01 “Applicant” means:

(a) A professional engineer or professional geologist licensed in New Hampshire performing corrective action, a corrective action contractor, or an individual or company performing Env-Dw 300 public water supply gasoline ether monitoring or notification under RSA 485:16-a, II, under contract with an owner;

(b) The New Hampshire department of transportation or political subdivisions of the State performing corrective action under a written agreement with an owner concerning management of contamination encountered during construction projects near the owner’s property; or

(c) The department.

Odb 402.02 “Board” means the oil fund disbursement board established by RSA 146-D:4.

Odb 402.03 “Bodily injury costs” means damages proven by expert medical testimony as to diagnosable personal injury, illness, or other bodily injury, including emotional distress accompanied by physical manifestations suffered by a party other than an owner or its agents as a result of a discharge.

Odb 402.04 “Capital equipment” means electronic, chemical, mechanical, or structural equipment installed to perform contamination source removal or treatment, which has a long-term life greater than 2 years and has an initial value or purchase cost, either individually or as an aggregate, of \$10,000.00 or more.

Odb 402.05 “Compliance” means conformance with applicable local, state, and federal facility operating requirements, including the department guidance document titled, “Best Management Practices for the Installation and Upgrading of On-Premise-Use Heating Oil Tanks” (2008 edition).

Odb 402.06 “Contamination” means “contamination” as defined in Env-Or 602.

Odb 402.07 “Contract” means a formal written agreement that specifies the service performed and the terms and conditions of the service.

Odb 402.08 “Corrective action” means activities performed in accordance with department rules to contain a discharge or remedy contamination including reasonable restoration of property damaged while performing corrective action, which is not covered under an owner’s or corrective action service provider’s insurance. Corrective action does not include restoration of property damaged by a discharge.

Odb 402.09 “Corrective action contractor” means an individual or company that is primarily in the business of providing corrective action services, has the necessary equipment and facilities, and employs appropriately-trained, experienced personnel with current U.S. Occupational Safety and Health Administration certification.

Odb 402.10 “Corrective action report” means a report on site conditions or cleanup submitted in accordance with department rules.

Odb 402.11 “Deductible” means initial costs incurred for which an owner is liable to the fund under RSA 146-D:6, V and RSA 146-D:6, VI.

Odb 402.12 “Department” means the New Hampshire department of environmental services.

Odb 402.13 “Discharge” means a spill or release of oil, fuel oil, motor oil, gasoline, or gasoline ethers.

Odb 402.14 “Facility” means a location, including structures or land, at which oil is subjected to treatment, storage, processing, refining, pumping, transfer, or collection. The term, including:

- (a) An “above ground storage facility ” as defined in RSA 146-D:2, I;
- (b) An “on-premise-use facility” as defined in RSA 146-D:2, VI;
- (c) A “motor oil storage facility” as defined in RSA 146-D:2, IV;
- (d) An “underground storage facility” as defined in RSA 146-D:2, VIII; or
- (e) “Potential contamination source” as defined in RSA 146-D:2, VII, as applicable.

Odb 402.15 “Financial statement” means a complete accounting of a facility owner's financial condition prepared in accordance with generally accepted accounting practices or standards including a statement of assets and liabilities, income statement, statement of cash flows, and statement of whether the owner is creditworthy.

Odb 402.16 “Fund” means the oil discharge and disposal cleanup fund established by RSA 146-D.

Odb 402.17 “Other insurance” means private insurance coverage for corrective action or third-party damage costs that is valid and collectible by the owner, and includes private insurance held by the owner through either a wholly-owned or jointly-owned subsidiary in the business of providing insurance coverage to the owner or to the owner and others.

Odb 402.18 “Owner” means the person having legal ownership of an oil storage facility, land, and potential contamination source properties under RSA 146-D:6, II and public and private water supplies under RSA 146-D:6, I.

Odb 402.19 “Performance standard” means the expected level of completeness, quality, or reduction in measurable contamination when performing corrective action based on department rules.

Odb 402.20 “Person” means any company and its parents, subsidiaries, business units, and affiliates established under any legal form, an individual, group, trust, firm, joint stock company, corporation including a government corporation, partnership, association, limited liability company, state and agencies thereof, municipality, commission, political subdivision of a state, interstate body, consortium, joint venture, commercial entity, the United States government and agencies thereof, and any other legal entity including those wholly owned by the same individual or parent entity, and legal entities that share identical or interlocking boards of directors.

Odb 402.21 “Project cost ledger” means a department-approved electronic spreadsheet, accounting software, or other electronic application or system, that itemizes all costs and charges to a fund-eligible project, and ties those costs and charges to a general ledger accounting system.

Odb 402.22 “Property damage” means physical damage to, or loss of use of, tangible property owned by a party other than the facility owner or his or her employees.

Odb 402.23 “Reimbursement” means an assignment of money from the fund.

Odb 402.24 “Site” means “site” as defined in Env-Or 602.31.

Odb 402.25 “Third-party damages” means damages, which are an obligation of an owner as a result of a court-approved settlement or judgment in a civil action against the owner by a party who has suffered bodily injury or property damage as defined in this part.

Odb 402.26 “Upload submittal” means a reimbursement request submitted via the department One Stop Data Provider web site <https://www2.des.state.nh.us/OnestopDataProviders/DESLogin.aspx>, or successor systems, in portable document format (PDF).

Odb 402.27 “Web-based submittal” means a reimbursement request submitted by an applicant via the department One Stop Data Provider web site <https://www2.des.state.nh.us/OnestopDataProviders/DESLogin.aspx>, or successor systems, using an application developed and maintained by the department for that purpose.

Odb 402.28 “Web-based submittal with expedited payment” means a web-based submittal that is processed for payment within 30 days.

Readopt with amendment Odb 403, eff. 9-1-11 (doc. #9935-B), to read as follows:

PART Odb 403 REIMBURSEMENT REQUEST DOCUMENTS

Odb 403.01 Invoice Summary for Paper and Upload Submittals.

(a) An owner or applicant submitting a reimbursement request shall provide an invoice summary that lists each contractor invoice and includes the following information:

- (1) A page header including the department site number, project number, site/project name, and reimbursement request number;
- (2) For each invoice:
 - a. Contractor invoice number and date;
 - b. The department work scope and budget approval date, if applicable;
 - c. The department phase and class code;
 - d. Contractor name, and if applicable, subcontractor name;
 - e. Summary description of work for each phase and class;
 - f. Work scope budget amount;
 - g. Payment amount requested; and
 - h. Work scope budget balance, if any; and
- (3) The total work scope budget and budget balance, and total amount requested.

Odb 403.02 Reimbursement Authorization Form. An owner submitting a reimbursement request shall provide the following information on a “Reimbursement Authorization Form” obtained from the board:

- (a) Authorization information including the type of facility or project and whether reimbursement is sought for corrective action costs or third-party damages;
- (b) Facility, property, and project information including:
 - (1) Facility and property name, as applicable;
 - (2) Address;

- (3) Location town;
 - (4) The department facility identification number if applicable;
 - (5) The department project number;
 - (6) For an initial authorization, the date of discharge discovery; and
 - (7) A statement indicating whether the facility is active or permanently closed;
- (c) Owner and insurance information including:
- (1) Owner name;
 - (2) Mailing address;
 - (3) Daytime phone number;
 - (4) Whether the owner is a new owner since the last authorization;
 - (5) Number of facilities owned if more than one; and
 - (6) If an initial authorization for a discharge, whether other insurance coverage is available; and
- (d) The owner's or corporate officer's signature and date certifying the following liability statement and affirmation:

"I hereby certify that the facility referenced above is currently in compliance, or I am the owner of land where a compliant facility was located, or I am a duly authorized officer of the entity that owns the compliant facility or land where a compliant facility was located. I understand that a 'deductible' or deductible balance may be applied against any amounts reimbursed from the fund. If reimbursement is made to an 'applicant', I understand that the deductible or deductible balance amount may be billed and that said amount is due within 30 days of the billing date, unless the board approves periodic payments. I understand the funds under RSA 146-D:6, IV (b-d) only provide excess insurance coverage. I declare that the representations made in this reimbursement authorization are to the best of my knowledge true and correct, and agree to reimburse the fund for any payments made based upon incorrect information on this form, or incorrect reimbursement submittal information. If an officer of the owner, I affirm that I have been duly authorized by the corporation, LLC, LLP, or other corporate entity to bind the corporation, LLC, LLP, or other corporate entity, and to make the above declarations. I also affirm that the corporation, LLC, LLP, or other corporate entity has made all filings and paid all fees required by the New Hampshire Secretary of State."

Readopt with amendment Odb 404, eff. 9-1-11 (doc. #9935-A), to read as follows:

PART Odb 404 REIMBURSEMENT REQUEST SUBMITTAL AND BOARD REVIEW

Odb 404.01 Requests for Reimbursement.

- (a) With the exception of requests submitted by the department, requests for reimbursement shall be submitted within one year of completing corrective action.
- (b) Requests for reimbursement for third-party damage costs shall be submitted within 60 days of notice of a final court order or court approved settlement for bodily injury costs or property damage costs as defined in this chapter.
- (c) An owner may submit a request for reimbursement for third-party damage costs only if notification was provided pursuant to Odb 408.01.
- (d) An owner or applicant may submit a request for reimbursement only if the limits of coverage under other valid and collectible policies of insurance held by the owner, are reached.

(e) An applicant may only submit a request for reimbursement for services provided by the applicant, including subcontractors and suppliers.

Odb 404.02 Reimbursement Submittal Requirements.

(a) Requests for reimbursement shall include the following:

- (1) For an owner's initial request, a completed "Reimbursement Authorization Form" that includes the information required under Odb 403.02;
- (2) For paper submittals, upload submittals, or an initial web-based submittal a list or brief description of the information included in the reimbursement request submittal, in the form of a cover or transmittal letter;
- (3) For paper or upload submittals a summary of invoiced expenses which includes the information required under Odb 403.01;
- (4) A copy of the work scope approval notice under Odb 407.01(d), if applicable;
- (5) Copies of all contractor and subcontractor invoices and contractor personnel timesheets or timesheet summary;
- (6) Tabulation of bid item quantities, bid item price, bid item total cost, and total job cost for bid-based work, if applicable;
- (7) A copy of the contract under Odb 406.03 if applicable;
- (8) Employee payroll records, cost of employee benefits and equipment operating cost data when corrective action is performed by the owner;
- (9) Other insurance information required under Odb 405.02, if applicable;
- (10) A copy of the agreement stating a facility owner has a legal obligation to continue corrective action after ownership is conveyed, if applicable;
- (11) A copy of the final court order or court approved settlement for third-party damages;
- (12) For an initial request, facility compliance information, if applicable; and
- (13) For an initial request, a completed department "Alternate W-9 Form" to obtain a vendor number, if applicable.

(b) A re-submittal of information related to a request when the approved amount was less than the requested amount shall be re-submitted within 180 days of the action date and shall include an explanation of the basis of the re-submittal and a copy of the reimbursement approval notice issued under Odb 404.03(d) indicating which costs are being re-submitted.

(c) Reimbursement requests shall be submitted concurrently with the corrective action report, if applicable.

(d) No reimbursement request shall be submitted that includes costs incurred by an owner or applicant after corrective action is deemed complete by the department and a corrective action report was provided, if applicable.

Odb 404.03 Reimbursement Review Procedures.

(a) Upon receipt of a request for reimbursement, the board shall, through the department, determine if the request is complete pursuant to Odb 404.01 and Odb 404.02. Incomplete requests shall be returned within 30 days of receipt.

(b) Upon receipt of a complete reimbursement request, the board shall request that the department report its recommendation for reimbursement within 60 days of the date of receipt.

(c) The board shall, through the department, determine the amount of reimbursement based on the reimbursable cost criteria of Odb 407 and Odb 408 and shall authorize the state treasurer to disburse said amount from the fund.

(d) The board shall, through the department, issue a notice of reimbursement to the owner or applicant within 30 days of a reimbursement determination.

(e) If the reimbursement amount is less than the requested amount, or if no reimbursement is due, the notice of reimbursement shall indicate the reasons for a reduction in payment or non-payment.

(f) All reimbursements from the fund for corrective action performed by the department shall be paid directly to the department.

Odb 404.04 Reimbursement Request Priority.

(a) The board shall consider requests for reimbursement from the fund as follows:

- (1) Web-based submittals with expedited payment and corrective action performed by the department shall have first priority;
- (2) Web-based submittals shall have second priority;
- (3) Upload submittals shall have third priority; and
- (4) Paper submittals shall have fourth priority.

(b) The board shall consider requests for reimbursement in the chronological order received regardless of the submittal method, if the balance in the fund is not sufficient to pay all uncontested reimbursement requests.

Readopt with amendment Odb 405, eff. 9-1-11 (doc. #9935-A), to read as follows:

PART Odb 405 FUND AVAILABILITY AND OTHER INSURANCE

Odb 405.01 Fund Availability.

(a) The fund shall be available for reimbursement of costs incurred for corrective action, third-party damages, public water supply gasoline ether monitoring under Env-Dw 300, and providing notification under RSA 485:16-a, II.

(b) The fund shall be available to the owner of a facility for the first discharge if the facility is in compliance.

(c) The fund shall be available to the owner of a facility for subsequent discharges if the owner maintains compliance after compliance is achieved, as specified in (b) above.

(d) The fund shall be fully available to owners of on-premise-use facilities or land where on-premise-use facilities are located for corrective action cost and third-party damage cost reimbursement if the facility is now and was in compliance on July 1, 2015.

(e) With the exception of owners qualifying under paragraph (f) below, owners of on-premise-use facilities or land where on-premise-use facilities are located, that were not in compliance on July 1, 2015, shall be subject to a reduction in corrective action cost and third-party damage cost reimbursement in the amount of \$500 for the state, political subdivisions, non-profit organizations, school districts, residences, and businesses.

(f) The fund shall be available to meet the requirements of RSA 146 D:6, IV(a), subject to the following:

- (1) The on-premise-use facility is located at a property that is the primary residence of the owner including a single-family home, a duplex, a manufactured home, a farm, or a property where the owner also operates a small business;
- (2) The owner does not hold title to, or have an interest in, any income producing property other than that specified in (1) above, including but not limited to, stocks or real property held either individually, or through a business, trust, or other related entity; and
- (3) The owner's total household annual income does not exceed 24 CFR, Title 24, U.S. Department of Housing and Urban Development, low-income criteria that apply to the county or metropolitan statistical area where the property is located.

(g) The fund shall be available to:

- (1) The current facility owner;
- (2) A former facility or landowner for costs incurred during ownership, including completion of work contracted prior to ownership transfer;
- (3) A former facility or landowner for costs incurred under a legal indemnification agreement which obligates the former owner to continue corrective action after the facility or land is sold; or
- (4) A landowner where a compliant facility was located.

Odb 405.02 Coverage Under Other Insurance.

(a) The fund shall provide excess insurance to reimburse corrective action costs and third-party damage costs not covered within the limits of other valid and collectible insurance. The fund shall provide coverage only after any primary, excess, and umbrella coverage is exhausted.

(b) An owner who will seek reimbursement under RSA 146-D:6, IV(b-d) shall first submit claims to other insurance providers for purposes of a coverage determination before submitting any reimbursement requests to the board. The owner shall submit documentation regarding the findings of the coverage determination prior to, or when submitting an initial reimbursement request to the board.

(c) An owner may use other insurance to cover the cost of the fund deductible or for costs that are not eligible under the fund. Reimbursements from the fund shall be adjusted such that the total of payments received from the fund and other insurance does not exceed an owner's total incurred costs.

(d) The board shall not approve reimbursement to an insurer that submits a claim under a subrogation agreement with the owner or through an owner's attempted assignment of interest.

(e) The board shall be subrogated to any claims by an owner for coverage, payments, or reimbursements against any person to whom the owner has a claim.

(f) An owner who received fund reimbursement for a discharge occurrence and subsequently receives payment from an insurer for the same discharge occurrence shall immediately notify the board of such payment. The board shall determine whether the fund is entitled to full or partial repayment and shall notify the owner of such determination.

Readopt with amendment Odb 406, eff. 9-1-11 (doc. #9935-A), to read as follows:

PART Odb 406 OWNER AND APPLICANT RESPONSIBILITIES

Odb 406.01 Assignment and Subrogation.

(a) An owner's assignment of interest in the fund or right of subrogation claims against the fund shall not be assignable or transferable to a third party. Any attempted assignment or transfer shall not be effective against the fund and shall be considered void.

(b) If an owner's insurance coverage, or the responsibility for corrective action or third-party damages, is in dispute, and in the event of any payment from the fund, the board shall be subrogated to all the owner's rights of recovery therefor against any person or organization including other insurers. The owner shall execute and deliver instruments and do whatever else is necessary for the board to pursue such claims upon request by the board.

(c) The board shall be subrogated to any claims by an owner against any third parties and the board shall be entitled to recover any payments made by a third party to an owner for expenses previously reimbursed by the fund.

Odb 406.02 Liability for Deductible.

(a) The deductible amount described in RSA 146-D:6, V shall be withheld from reimbursement to an owner, but not withheld from an applicant.

(b) If a deductible is not withheld, the board shall bill the owner for the deductible amount through the department and the owner shall pay the amount within 30 days of the billing date.

(c) If the owner is financially unable to pay the entire deductible amount within 30 days of the billing date, the owner shall submit a financial statement and proposed periodic payment amount and payment schedule that is commensurate with the owner's ability to pay.

(d) The board shall approve a request for periodic payments upon determining that it is supported by the owner's financial statement, and shall issue a written notice of its decision.

(e) The deductible amount described in RSA 146-D:6, VI shall be withheld from reimbursement to an owner or applicant.

(f) The deductible assessed for each facility discharge shall be based on the total number of facilities owned pursuant to RSA 146-D:6, V, as applicable. Any permanently closed facility at which no contamination is present, no corrective action is required, or no access to the fund will be sought, shall not be included in the total ownership count for purposes of determining the deductible.

(g) A separate deductible shall be applied for each discharge.

(h) The owner of an on-premise-use facility qualified under Odb 405.01(f) shall also qualify for a reduced deductible under RSA 146-D:6, VI.

Odb 406.03 Contracts.

(a) An owner may enter into a contract that includes provisions for direct reimbursement to an applicant.

(b) Contracts shall be executed prior to the performance of work by the applicant, and shall not provide for separate reimbursement to individual subcontractors.

(c) The applicant shall agree to waive all claims against the owner for payment of services performed within the limits of a corrective action contract.

(d) For implementation of a remedial action plan, an owner may enter into 2 separate applicant contracts, one contract with a professional engineer or professional geologist for management and oversight of the work, and another contract for construction or cleanup operation services.

Odb 406.04 Right to Enter. An owner shall allow the board or its designee to enter, during reasonable hours, any facility or site location and associated structures, including offices, to inspect any activity and records related to a reimbursement request.

Odb 406.05 Audits and Qualifications.

(a) An owner or applicant shall allow the board or its designee to conduct periodic financial audits of all records related to a reimbursement request, including project cost ledgers, contractor invoices, subcontractor and vendor invoices, expense receipts, timesheets or timesheet summaries, daily work orders, inventory records and other documents as necessary to substantiate reimbursed costs.

(b) Applicants that are professional engineers, professional geologists or corrective action contractors shall maintain a separate project cost ledger for each fund-eligible project.

(c) To qualify for web-based submittals an applicant shall complete training provided by the department.

(d) To qualify for web-based submittals with expedited payment, an applicant shall:

(1) Complete web-based submittal training provided by the department;

(2) Request qualification for expedited payment, in writing; and

(3) During the 12 months prior to requesting qualification, have submitted 6 or more reimbursement requests, of which 95% or more were complete, and no more than 2 incomplete corrective action reports.

(e) An applicant shall be disqualified from receiving expedited payment for web-based submittals for 12 months following completion of a department audit, if the audit findings are as follows:

(1) More than 5% of web-based submittals or more than 2 corrective action report submittals for the 12-month period prior to the audit were incomplete; or

(2) Two or more web-based submittals included costs that are not reimbursable under Odb 407.09 and Odb 407.10.

(f) An applicant disqualified under Odb 406.05(e) seeking re-qualification shall make internal process corrections to prevent future errors and report the corrections made, in writing, prior to expiration of the 12-month disqualification period.

(g) If a periodic financial audit reveals that an owner or applicant received an overpayment for a reimbursement request, the owner or applicant shall be liable to the fund for any overpayment amount.

(h) The board shall, through the department, provide written notification to an applicant of a qualification determination under Odb 406.05(d) or re-qualification under Odb 406.05(f), within 45 days of a request.

(i) The board shall, through the department, provide written notification of disqualification under Odb 406.05(e) within 10 days of completing an audit.

(j) Nothing contained in this chapter shall relieve an owner or applicant from liability under RSA 146-D:7.

Readopt with amendment Odb 407, eff. 9-1-11 (doc. #9935-A), to read as follows:

PART Odb 407 REIMBURSEMENT OF CORRECTIVE ACTION COSTS

Odb 407.01 Corrective Action Work Scope Requirements.

(a) With the exception of emergency response action performed under Env-Or 605.03, an owner or applicant seeking reimbursement from the fund shall submit a work scope and budget prior to performing corrective action.

(b) If applicable, the owner or applicant shall evaluate the cost-effectiveness of leasing versus purchasing capital equipment considering equipment cost, reliability, efficiency and performance over the estimated duration of the project, and shall include the evaluation data with the work scope and budget.

(c) The board shall, through the department, approve a work scope and budget upon determining the proposed work conforms to the technical criteria established in Env-Dw 300, Env-Or 600, We 600, We 700, and We 800, as applicable, and the reimbursable corrective action cost criteria of this part.

(d) The board shall, through the department, issue a work scope approval notice that includes the approved budget and a description of the work pursuant to the technical criteria established in Env-Dw 300, Env-Or 600, We 600, We 700, and We 800, as applicable.

Odb 407.02 Corrective Action Performed by Owner. An owner may perform corrective action with its own employees and equipment subject to other applicable requirements or limitations of this chapter. Reimbursement shall be limited to actual costs based on employee pay rates, cost of benefits and equipment operating costs. Costs associated with direct oversight of employees shall not be reimbursable.

Odb 407.03 Interim Water Supply. Temporary supplies of potable water provided under authority of RSA 146-D:6 I, shall only be available through department contractors.

Odb 407.04 Connection to Existing Public or Non-Public Water Supply System.

(a) An owner of a private water supply may request reimbursement under RSA 146-D:6 I for permanent connection to a public or non-public water supply system available at or near the owner's property boundary.

(b) The owner shall provide a letter from the water supply system owner or operator authorizing the connection when submitting a work scope and budget to the board.

(c) Connections to an existing public or non-public water supply system shall be approved based on conformance with technical criteria established in Env-Dw 300, and We 600, We 700, and We 800 of the water well board, as applicable.

(d) If applicable, the owner shall provide a letter from the water supply system owner or operator stating the work was inspected and meets all connection requirements, when submitting a reimbursement request to the board.

(e) Reimbursable costs shall include the installation of piping, plumbing connections and appurtenances necessary to provide a permanent connection to a public or non-public water supply system, standard one-time connection fees assessed by the water supply system owner, if any, and the costs required to abandon a contaminated supply well.

Odb 407.05 Replacement of Private Water Supply.

(a) An owner of a private water supply may request reimbursement under RSA 146-D:6 I for the installation of a new or replacement groundwater supply well and appurtenances.

(b) A new or replacement private water supply shall be approvable if connection to a public or non-public water supply system is not available, or if the cost of connection would exceed the cost of establishing a viable new or replacement private water supply.

(c) Installations of private groundwater supply wells shall be approved based on conformance with technical criteria established in Env-Dw 300 or We 600, We 700 and We 800 of the water well board, as applicable.

(d) Reimbursable costs shall include site location and development activities, construction of the supply well and pump installation, treatment systems, piping installations, plumbing connections and other necessary appurtenances, startup costs, and the costs required to abandon a contaminated supply well.

Odb 407.06 Public and Non-Public Water Supply Systems.

(a) An owner of a public or non-public water supply system may request reimbursement under RSA 146-D:6 I for a feasibility study, the construction of a distribution system extension, construction of new treatment processes, water supply wells or distribution systems, replacement of a water supply well, or connection to another public or non-public water supply system.

(b) The owner shall conduct a feasibility study and submit a study report prepared by a New Hampshire licensed professional engineer, describing the proposed project in detail and including the following:

- (1) A discussion of the overall necessity of the project with respect to the level of contamination requiring remediation and the ability of the project to provide a long term solution to the problem;
- (2) Data regarding the extent of contamination including the number of properties and residential units or their equivalents affected;
- (3) Data regarding the number of non-contaminated properties and residential units potentially benefiting by the project compared with the number affected by the contamination;
- (4) The estimated reimbursable apportioned share of the construction costs based on the criteria given under Odb 407.07 and a statement of commitment that the owner will contribute the non-reimbursable share;
- (5) A discussion of the alternatives considered, a cost-benefit analysis of the alternatives considered, and the rationale for the selection of the proposed project; and
- (6) A detailed project cost estimate including the total amount of reimbursement ultimately sought from the fund.

(c) The board shall approve the construction of a distribution system extension, construction of new treatment processes, water supply wells or distribution systems, replacement of a water supply well, or connection to another public or non-public water supply system upon determining the following:

- (1) The proposed project conforms to the technical criteria established in Env-Dw 300, as applicable, and the apportioning criteria of Odb 407.07, if applicable;
- (2) New distribution system storage or pumping capacity is needed for the operation of a distribution system extension;
- (3) The proposed project costs and hookup fees assessed by another owner are specifically related to removing contamination, in consideration of system capacity and total safe yield of water supply wells lost or gained; and
- (4) The proposed project is the most favorable alternative among those considered pursuant to (b)(5), above.

(d) Reimbursable costs shall include feasibility study, feasibility study report preparation, and preliminary design costs, whether or not a project proceeds to construction.

(e) If a project proceeds to construction, reimbursable costs shall include the costs in (d) above, and design, construction, construction oversight, startup, and hookup fee costs.

Odb 407.07 Apportioned Share of Construction Costs for Public or Non-Public Water Supply System Extensions. Water supply system extension costs reimbursable under RSA 146-D:6, I shall be determined by multiplying the percentage of properties serviced that are contaminated by the total project engineering and construction costs attributable to the installation of the distribution mains and appurtenances, to which shall be added 100% of the connection costs and the costs required to abandon the existing water supply for each contaminated property.

Odb 407.08 Construction Financing. If the balance in the oil discharge and disposal cleanup fund plus projected revenues is not sufficient to pay all current uncontested reimbursement claims, current obligations of the department, and estimated future reimbursement claims for known projects, the board shall require that construction projects approved under Odb 407.06 be financed through notes or bonds. In such cases, the fund shall be available for administration costs and for periodic payments of principle and interest due under the note or bond, subject to the other limitations of this chapter.

Odb 407.09 Reimbursable Corrective Action Costs.

(a) Reimbursable corrective action costs shall be the usual and customary market rates or costs for labor, equipment, capital equipment startup, operation, maintenance and relocation pursuant to (d)(3) below, materials and supplies, goods, services or task, administration of subcontracted services, fuel and insurance cost surcharge, inventory holding time, procurement of materials and supplies, and markup.

(b) The costs for the installation or use of capital equipment shall be reimbursable at the lease rate, or if purchased, at the vendor cost as established by the firm invoiced cost to the owner.

(c) If the capital equipment is purchased, the fund shall retain all rights for any salvage value of the equipment.

(d) When the project is at or near completion the board, in consultation with the owner regarding its intentions for the disposition of purchased capital equipment, shall:

- (1) Withhold from reimbursement an amount equal to the actual or calculated salvage value;
- (2) Require that the actual salvage value be repaid to the fund if the equipment is repossessed or sold; or
- (3) Allow the use of the equipment for corrective action at another of the owner's facilities or properties.

Odb 407.10 Reimbursement Limitations for Corrective Action Costs.

(a) Reimbursement shall not exceed actual invoiced costs paid or incurred less any discounts received.

(b) The costs for local, state or federal inspection fees, or charges related to obtaining access, shall not be reimbursable.

(c) Legal costs shall not be reimbursable.

(d) An owner's administrative, fiduciary management or supervisory costs shall not be reimbursable.

(e) Interest charges on unpaid invoices or other obligations shall not be reimbursable.

(f) Civil penalties or double cost recovery under RSA 146-A or RSA 146-C shall not be reimbursable.

- (g) Costs associated with the discovery of a discharge shall not be reimbursable.
- (h) Costs paid by insurance shall not be reimbursable.
- (i) Costs in excess of approved budgets shall not be reimbursable.

(j) Reimbursable costs shall be limited to corrective action work certified as complete by the department, a New Hampshire licensed professional engineer, or New Hampshire licensed professional geologist, including measurement of quantities, and equipment installed and operational, as applicable.

(k) No reimbursement shall be approved for any work that does not meet the corrective action performance standard.

Readopt with amendment Odb 408, eff. 9-1-11 (doc. #9935-A), to read as follows:

PART Odb 408 REIMBURSEMENT OF THIRD-PARTY DAMAGE COSTS

Odb 408.01 Owner's Duties in the Event of Claim or Suit.

(a) If a demand for payment of third-party damages is made against an owner who will seek reimbursement under RSA 146-D:6, II, the owner shall forward such demand to the board within 30 days of receipt and shall inform the board of any attempts made to settle the matter before the filing of a writ or petition. The owner shall undertake any actions necessary to obtain a reasonable settlement, including initiating demands against other parties who may be liable to the owner for such damages.

(b) Upon service of a writ or petition filed in a court of law by a third party the owner shall provide written notice to the board within 30 days of the return date.

(c) The owner shall provide the board with a copy of all documents related to the third-party action, including those filed with the court, and shall provide timely notice of scheduled hearings, settlement conferences and other actions throughout the proceedings.

(d) The owner shall defend the claim to preserve the right to seek reimbursement for third-party damages. The owner shall cooperate fully with the board in all matters relating to defending the claim.

(e) The owner shall enforce any right to contribution or indemnity against any person or organization who may be liable to the owner or to the third party claimant and shall seek to join such person or organization in any suit brought by a third party against the owner.

(f) The owner shall submit all proposed settlements to the board before entering an agreement with the claimant and before seeking approval from the court.

Odb 408.02 Board Intervention in Third-Party Action.

(a) The board shall not be responsible for the defense of the owner but shall have the right to intervene in the action as a party in interest, and shall have the right to participate in all settlement discussions related to a threatened or filed third-party action.

(b) The owner shall concur in any motions to intervene filed with the reviewing court by the board.

Odb 408.03 Reimbursement of Third-Party Damages.

(a) The owner shall be eligible for reimbursement of third-party damages that are not payable by other insurance, to the extent that the court-ordered judgment or settlement consists of compensable bodily injury costs or property damage costs suffered by the claimant.

(b) If the board determines that a proposed settlement is collusive, is not legally or factually supportable or does not fairly reflect compensable third party damages, it shall so notify the owner and shall deny any subsequent request for reimbursement based upon such settlement.

(c) If an owner proceeds to seek court approval of a settlement to which the board objects under paragraph (b), the board shall notify the court of such objection.

(d) The board shall deny any request for reimbursement of third-party damages to the extent that the settlement or judgment meets the criteria for objection under paragraph (b).

(e) An owner's legal fees and costs, including contingent fees, punitive awards, statutory double damages, fines, and costs imposed by the court, shall not be reimbursable.

(f) All settlements entered into by an owner shall allocate legal fees costs, and double damages fines and costs, if any, separately from amounts payable to the plaintiffs. The owner shall request that the amount awarded for legal fees, costs, double damages, fines and costs, if any, be identified in any jury or court award or verdict.

Odb 408.04 Reimbursement Limitations for Third-Party Damages

(a) No reimbursement shall be made from the fund for third-party damage costs until the amount of the owner's obligation to pay is finally determined either by judgment against the owner after trial on the merits or by written agreement between the owner and the claimant and entered as an order by a court of law.

(b) Reimbursable third-party damages shall be limited to certain monetary damages as a result of a court-ordered judgment or court approved settlement entered as an order of the court. The board shall not be bound by any obligations imposed upon the owner through settlement or court-approved judgment for injunctive relief or defense and indemnity of future actions by third parties against the claimant.

(c) No reimbursement shall be made from the fund for liability attributable to any party other than the owner. In all multi-party cases, all settlements entered into by the owner shall apportion liability among the pertinent parties. The owner shall request that the court order apportion liability among the pertinent parties in any jury or court award or verdict.

(d) Where an owner's third-party damages are based on a civil judgment, the costs shall not be reimbursable if resulting from a default judgment, or a proceeding otherwise not on the merits or not litigated by the owner to secure a reasonable settlement.

Readopt with amendment Odb 409, eff. 9-1-11 (doc. #9935-A), to read as follows:

PART Odb 409 WAIVER OF RULES

Odb 409.01 Requests for Waivers.

(a) With the exception of the Odb 405.01(d) compliance date, an owner or applicant may request that the board waive the application of the rules of this chapter pertaining to fund eligibility and reimbursement, unless such request, if granted, would constitute a waiver of statutory requirements.

(b) Requests for waivers shall be submitted in writing to the board and include the following information:

- (1) A specific reference to the section of the rule for which a waiver is being sought;
- (2) A full explanation of why a waiver is necessary;
- (3) If applicable, a full explanation of any alternative procedure, method, or activity that is proposed to be substituted for the procedure, method or activity required by the rule and for which a waiver is being sought, with supportive information; and

(4) A full explanation of how the granting of a waiver would be consistent with the intent of RSA 146-D and this chapter.

(c) The board shall approve a request for a waiver if it determines that the economic, technical, safety, or procedural benefits of granting a waiver are greater than the benefits of not granting the waiver and that proposed alternatives, if any, are adequate to ensure that the applicable statutory requirements are satisfied.

(d) The board shall provide written notice of its decision.

APPENDIX A: STATE STATUTES IMPLEMENTED

Rule(s)	Statute(s)
Odb 401 - Odb 402	RSA 146-D:1; RSA 146-D:5, I(a)-(e); RSA 146-D:6, I-VII; RSA 146-D:6, X-XI
Odb 403.01 -403.03	RSA 146-D:6, I-VII; RSA 146-D:6, X-XI
Odb 404.01-404.04	RSA 146-D:6, VII
Odb 405.01	RSA 146-D:6, I-VII; RSA 146-D:6, X-XI
Odb 405.02	RSA 146-D:6, VII
Odb 406.01	RSA 146-D:6, II
Odb 406.02	RSA 146-D:6, V-VII
Odb 406.03-Odb 406.05	RSA 146-D:5, I(b)-(c)
Odb 407.01 - Odb 407.02	RSA 146-D:5, I(c)-(d)
Odb 407.03 - Odb 407.08	RSA 146-D:6, I- X
Odb 407.09 - Odb 407.10	RSA 146-D:5, I(b)-(c)
Odb 408.01 – 408.04	RSA 146-D:6, I-XI
Odb 409.01	RSA 146-D:6, I-IV; RSA 146-D:6, VII-VIII